IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-131

SEA-LAND SERVICE, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN C. FRICANO
JOHN M. NANNES
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

INDEX

CITATIONS

Cases:

CITATIONS—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

SEA-LAND SERVICE, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Sea-Land Service, Inc. ("Sea-Land" or the "Company") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 28, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto.[1] No opinion was rendered by the District Court for the District of Columbia.

---

[1] In the Court of Appeals, the case was styled *In Re: Grand Jury Investigation of Ocean Transportation, Appellant.*

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on March 28, 1979. A timely petition for rehearing *en banc* was denied on May 1, 1979, (Appendix B) and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

I. Whether the inadvertent production of privileged documents to the Government, in connection with a subpoena duces tecum issued in a grand jury investigation, by an attorney without the authorization and contrary to the instructions of the client, constitutes a waiver of the attorney-client privilege as a matter of law.

STATEMENT OF THE CASE

The Antitrust Division of the Department of Justice ("Government") began a grand jury investigation in 1976 in Washington, D.C. into ocean transportation of freight. In August 1976, grand jury subpoenas duces tecum were issued to Sea-Land and other shipping companies operating in the North Atlantic.[2] The subpoena issued to Sea-Land required the production of documents to the Grand Jury or, in lieu thereof, directly to the Government. It required the production of documents from the Company's files relating to operations between

[2] Sea-Land is one of the world's largest containerized shipping companies. It owns and operates container ships that carry products in sealed containers that can be transported to and from inland points by trucks and railroads. Sea-Land is a member of numerous ocean shipping conferences that have been approved by the Federal Maritime Commission pursuant to Section 15 of the Shipping Act, 46 U.S.C. § 814. Members of those conferences enjoy an exemption from the antitrust laws for conduct authorized by the Federal Maritime Commission.

1972 and 1976 but did not demand the production of privileged documents.

The search of Sea-Land's files and the production of documents were conducted by maritime attorneys (referred to as "original counsel" in the opinion of the Court of Appeals) who had provided legal counsel to Sea-Land for many years, including the period covered by the subpoena. Original counsel was instructed by Sea-Land to produce all documents falling within the scope of the subpoena, but to withhold documents coming within the attorney-client privilege. Sea-Land did not authorize original counsel to produce privileged documents to the Government, and original counsel understood that it had no authority to do so.[3]

Original counsel sought to comply with Sea-Land's instructions by (1) segregating potentially privileged documents, (2) labeling them with a "P" in the upper right-hand corner, and (3) placing them in specially designated manila folders that would be withheld from production. Nevertheless, original counsel failed to comply with Sea-Land's instructions in two critical respects. First, on September 30, 1976, original counsel mistakenly delivered two of the specially designated manila folders containing eleven privileged documents to the Government along with documents intended for production.[4] Second, in ensuing months, original counsel completed

[3] Joint Appendix filed in the United States Court of Appeals for the District of Columbia Circuit ("JA") at 44. Copies of the Joint Appendix have been lodged with the Clerk of this Court.

[4] When original counsel delivered these documents to the Government on September 30, 1976, the Government noticed that certain documents appearing to be privileged and marked with a "P" had been included among the production. Government counsel contacted original counsel to inquire about the matter but original counsel mistakenly concluded, without undertaking to examine the documents, that the documents that had been delivered were intended for production. App. A at 4a-5a.

the production of documents from other Company files and failed to segregate and withhold ten additional privileged documents from the many thousands of documents produced to the Government.

After production had been substantially completed, original counsel began to review copies it had made of the documents produced to the Government. In March 1977, original counsel realized for the first time that privileged documents had been improperly delivered to the Government the previous September. Original counsel met with government attorneys to explain the unauthorized and improper production of the documents, but original counsel never pursued the return of the documents by submitting a formal request or memorandum in support thereof as had been requested by the Government. Original counsel deliberately withheld all of this information from Sea-Land until December 1977. (JA 43-44)

When Sea-Land learned of this unauthorized action, it terminated original counsel's representation, and special antitrust counsel immediately pursued return of the documents from the Government. While negotiations were pending, the Government called a Sea-Land employee before the Grand Jury to question him regarding the privileged documents. The employee asserted the attorney-client privilege, and the matter was brought before the District Court on the Government's motion to compel testimony and Sea-Land's motion for the return of privileged documents. The District Court granted the Government's motion and denied Sea-Land's motion on the grounds that the physical act of production by original counsel constituted a waiver of Sea-Land's privilege as a matter of law.[5]

[5] Thereafter, the employee reportedly answered questions regarding the documents. The transcript of that testimony remains under seal and has not been disclosed to Sea-Land or any person other than government attorneys and the grand jurors who are forbidden by Federal Rule of Criminal Procedure 6(e) from disclosing matters occurring before the Grand Jury.

Sea-Land appealed the denial of its motion to the Court of Appeals. The Company contended that the attorney-client privilege belongs to the client and not to the attorney. Therefore, the unauthorized actions of original counsel could not constitute a waiver of the privilege unless it could be shown that Sea-Land directly participated in the production of the documents or failed to repudiate counsel's action upon learning of the unauthorized act.

The Court of Appeals affirmed the judgment of the District Court. It held that the production of the "P" documents constituted a waiver of the attorney-client privilege because original counsel acted as Sea-Land's agent in the production of documents to the Government. The Court disputed neither the fact that original counsel had been instructed to withhold privileged documents nor the fact that the production had been mistaken. App. A at 4a-5a. Nevertheless, the Court concluded that it would be unfair to require the Government to return documents which it had been using during the investigation. With regard to the ten privileged documents that had not been marked "P", the Court of Appeals also held that Sea-Land was bound by original counsel's actions.

A timely petition for rehearing *en banc* was denied. Thereafter, on June 1, 1979, the Grand Jury returned a one-count indictment charging Sea-Land and others with a violation of Section 1 of the Sherman Act. Sea-Land pleaded *nolo contendere* on June 8, 1979. The plea was accepted, sentence was imposed, and all proceedings between Sea-Land and the Government terminated.

Upon conclusion of the proceedings, Sea-Land requested the Government to return all its documents. The Government returned the original documents on June 12, 1979, but notified Sea-Land that it would retain a complete set

of copies indefinitely. Since that time, the Government has (1) indicated an intention to use the copies in agency proceedings, (2) supported efforts by the Federal Maritime Commission to obtain the copies, and (3) refused Sea-Land's request to return all copies of Company documents, including the improperly produced privileged documents.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts with Decisions of Other Courts That Have Rejected Claims of Waiver Predicated Upon Unauthorized Actions of Counsel

It is clearly established law that the attorney-client privilege belongs to the client and not to the attorney. MCCORMICK ON EVIDENCE § 92, at 192 (Cleary ed. 1972). The opinion of the Court of Appeals holds that unauthorized actions of original counsel, in producing privileged documents to the Government, constitute a waiver of that privilege notwithstanding the fact that the client was unaware of such conduct and took all steps available to it to repudiate counsel's action upon learning of the improper production. In so holding, the decision of the Court of Appeals conflicts with decisions of the Second Circuit and the Ninth Circuit in instances involving less egregious attorney errors.

In *International Business Machines Corp.* v. *United States*, 471 F.2d 507 (2d Cir. 1972), *vacated on other grounds*, 480 F.2d 293 (2d Cir.), *cert. denied*, 416 U.S. 979-80 (1973), the Second Circuit refused to hold that the attorney-client privilege had been waived by the inadvertent production of documents by counsel acting pursuant to an accelerated discovery program. That Court did not dispose of the issue on agency grounds but instead indicated that "the real issue [was] are the documents privileged and was there a knowing and voluntary waiver

of the privilege." 471 F.2d, at 511. Similarly, in private antitrust cases involving the same documents, the Ninth Circuit held in *Transamerica Computer Company, Inc.* v. *International Business Machines Corp.*, 573 F.2d 646 (9th Cir. 1978), that the privilege had not been waived by the inadvertent disclosure of privileged documents because the compelled production of documents on an expedited schedule deprived IBM of an effective opportunity to claim the privilege. Circuit Judge Kennedy, concurring, stated that the disclosure of privileged information "by inadvertence even with the exercise of due care" posed a difficult question but that "the privilege would remain." 573 F.2d, at 653.

The Government was unable to cite any relevant authority at the appellate level in support of its proposition that the unauthorized actions of counsel constituted a waiver of the client's privilege. Indeed, in commenting upon the decision, *The Antitrust & Trade Regulation Report* noted: "The District of Columbia Circuit apparently becomes the first federal appellate court to hold that an attorney's inadvertent disclosure of documents—standing alone—can constitute, under circumstances, a waiver of the attorney-client privilege without the knowledge of the client." [6]

The fundamental error in the decision of the Court of Appeals was the failure to recognize the distinction between actions of the client, which may support a finding of waiver, and actions of the attorney, which cannot sustain such a finding. In addition to the Circuits noted, *supra*, numerous lower court decisions have recognized this distinction in fact. In those cases in which the production of privileged communications occurred due to attorney error, without any involvement of the client, the

---

[6] Bureau of National Affairs, Inc., The Antitrust & Trade Regulation Report, No. 908 at A-5 (April 5, 1979).

courts have uniformly held that the attorney-client privilege is not waived. *See Connecticut Mutual Life Insurance Co.* v. *Shields*, 18 F.R.D. 448 (S.D.N.Y. 1955); *Dunn Chemical Co.* v. *Sybron Corp.*, 1975-2 CCH Trade Cases ¶ 60,561 (S.D.N.Y. 1975); *SCM Corp.* v. *Xerox Corp.*, 70 F.R.D. 508, 519 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976); *United States* v. *Aluminum Company of America*, No. 61 C 147 (E.D. Mo. March 20, 1963); *United States* v. *Aluminum Company of America & Rome Cable Corp.*, Civil No. 8030 (N.D. N.Y. December 12, 1961); *United States* v. *Insurance Board of Cleveland*, 1954 CCH Trade Cases ¶ 67,873 (N.D. Ohio 1954); *United States* v. *New Wrinkle, Inc.*, 1954 CCH Trade Cases ¶ 67,883 (S.D. Ohio 1954).[7] In these cases, counsel responsible for the inadvertent disclosure were able to protect their clients by asserting the privilege upon discovery of the error, and the client was not penalized. The same result should certainly pertain in the present case in which original counsel not only made an erroneous disclosure but also compromised the client's interest by withholding that information from the client and failing to seek return of the documents.[8]

Where, by contrast, the client has either made or ordered disclosure, a waiver of the privilege has been found, and the client has not thereafter been permitted to assert the privilege. *See United States* v. *Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461 (E.D. Mich. 1954); *Underwater Storage, Inc.* v. *United States Rubber Co.*, 314 F. Supp.

---

[7] Each of these cases was brought to the attention of the Court of Appeals. The unreported decisions were made part of the record and are reproduced in the Joint Appendix. *See* note 3, *supra*.

[8] Under the reasoning of the Court of Appeals, even the *deliberate* and unauthorized disclosure of privileged documents by an attorney, for whatever reason, would bind the client, a result that has been unequivocally rejected. VIII WIGMORE ON EVIDENCE § 2326, at 633 n. 2 (McNaughton rev. 1961).

546 (D.D.C. 1970). The Court of Appeals mistakenly relied upon these two cases without recognizing the critical fact that the present case involves only attorney error.

Other federal courts have looked to the proposed Federal Rules of Evidence, which were approved by this Court although not ultimately adopted by the Congress, to provide a "convenient comprehensive guide to the federal law of privileges as it now stands." *United States* v. *Mackey*, 405 F. Supp. 854, 857-58 (E.D.N.Y. 1975). Proposed Rule 511 provides that a privilege may be waived if the "*holder of the privilege voluntarily* discloses or consents to disclosure of any significant part of the matter or communication." (Emphasis added.) Indeed, the Ninth Circuit relied upon this rule and reached its determination in the *Transamerica Computer* case, *supra*, that the privilege had not been waived. Here, by contrast, the Court of Appeals reached a conclusion at variance with the plain language of the rule.

The development of conflicting laws of privilege among the Federal Circuits creates an unacceptable measure of unfairness and uncertainty to holders of the privilege. The attorney-client privilege is designed to encourage clients to seek legal advice in order to conform their conduct to applicable law. Resort to legal advice is encouraged by the privilege which provides that disclosure of the substance of those communications cannot be compelled except by waiver of the holder of the privilege. The decision of the Court of Appeals fundamentally undermines these interests, contrary to the decisions of other Circuits, by holding that the improper and unauthorized production of privileged communications by an attorney constitutes a waiver of the client's privilege.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the District of Columbia Circuit.

Respectfully submitted,

JOHN C. FRICANO
JOHN M. NANNES
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
Suite 900
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 293-9233

Counsel for Petitioner
Sea-Land Service, Inc.

Dated: July 1979
Washington, D.C.

Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1539

IN RE: GRAND JURY INVESTIGATION OF OCEAN TRANSPORTATION, APPELLANT

Appeal from the United States District Court for the District of Columbia

(D.C. Miscellaneous No. 76-0162)

Argued February 9, 1979

Decided March 28, 1979

John C. Fricano with whom *John M. Nannes* and *C. Benjamin Crisman, Jr.* were on the brief, for appellant.

John J. Power, III, Attorney, Department of Justice with whom *J. Mark Manner*, Attorney, Department of Justice was on the brief for appellees.

Before: TAMM and ROBINSON, *Circuit Judges* and GERHARD A. GESELL*, *United States District Judge* for the United States District Court for the District of Columbia

Opinion Per Curiam.

---

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Per Curiam: The District Court denied a motion of Sea-Land Services, Inc. ("Sea-Land") for the return of various documents which Sea-Land alleges are protected by the attorney-client privilege but which were inadvertently disclosed to the Antitrust Division of the United States Department of Justice in the course of responding to a grand jury *duces tecum* subpoena. Sea-Land appeals. In response, the Government questions this Court's jurisdiction and asserts that, in any event, the District Court's order must be sustained because any privilege that existed as to these documents has been effectively waived. Accepting jurisdiction, we affirm.

I.

The Government contends that the order of the District Court is purely interlocutory, representing only a phase of a larger proceeding and that the holding in *Cobbledick* v. *United States*, 309 U.S. 323 (1940), bars review at this stage. When Sea-Land sued in the District Court, however, it had not for some time enjoyed possession of the documents. Consequently, it could not have pursued the traditional route for contesting the order by standing in contempt.* Therefore, the rationale of *Perlman* v. *United States*, 247 U.S. 7 (1918), not of the *Cobbledick* case, applies. *See Cobbledick* v. *United States*, *supra*, 309 U.S. at 328-29; *Nixon* v. *Sirica*, 487 F.2d 700, 721 n.100 (D.C. Cir. 1973) (en banc).

---

* The District Court ordered Mr. Halloran, an officer of Sea-Land, to testify as to the allegedly privileged documents. The Government maintains that the contempt route remained open since Sea-Land could have required Mr. Halloran to stand in contempt rather than testify. This claim must fail. That order ran against the employee, not against the company. Moreover, the officer was represented by his own counsel and, at least from the record, appears to have been unwilling to risk a contempt citation for Sea-Land's benefit. In these aspects, this case differs from *Shattuck* v. *Hoegl*, 523 F.2d 509, 512-13, 516 (2d Cir. 1975).

The present appeal also fits within the standards established by the Supreme Court for the review of "collateral" orders under 28 U.S.C. § 1291. *See Coopers & Lybrand* v. *Livesay*, 46 U.S.L.W. 4757, 4759 (June 21, 1978); *Abney* v. *United States*, 431 U.S. 651, 656-62 (1977); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 169-72 (1974); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949). The District Court's order conclusively determined the question of waiver. Nothing in the record suggests that the District Court regarded its ruling as either tentative or incomplete. Such further proceedings as will be conducted by the Justice Department in this case will also not be likely to develop any factual issue relevant to the attorney-client issue now before this Court. *See United States* v. *MacDonald*, 435 U.S. 850, 858-59 (1978). Secondly, appellate review will resolve an important issue completely separate from and collateral to the merits of the ongoing grand jury proceeding. *See United States* v. *Alexander*, 428 F.2d 1169, 1171 (8th Cir. 1970); *Coury* v. *United States*, 426 F.2d 1354, 1355 (6th Cir. 1970); *Goodman* v. *United States*, 369 F.2d 166, 167-68 (9th Cir. 1966); *Gottone* v. *United States*, 345 F.2d 165 (10th Cir.), *cert. denied*, 382 U.S. 901 (1965). No criminal trial is pending, *see DiBella* v. *United States*, 369 U.S. 121, 131-32 (1962); *In re Grand Jury Empaneled January 21, 1975*, 536 F.2d 1009, 1011 n.1 (3d Cir. 1976); *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600, 605 n.8 (D.C. Cir. 1976); nor is any delay or obstruction of the grand jury proceeding threatened by the instant appeal. Finally, Sea-Land must pursue its claim of attorney-client privilege at this time in order to ensure that its claim not later become moot by reason of the documents' disclosure to third parties. Absent the present appeal, these documents could be read or shown in the course of the grand jury proceedings to witnesses who would then be free under Fed. R. Crim. P. 6(e) to disclose them. Barring

an appeal at this stage might therefore subject Sea-Land to the irreparable loss of its right to claim the attorney-client privilege. Practical rather than technical considerations must control in this area. *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. at 546. Accordingly, we hold that jurisdiction to review the District Court's final order lies under 28 U.S.C. § 1291. Thus the issue of waiver is squarely presented.

II.

A brief recital of the facts is all that is necessary. It is undisputed that the United States has acted from the outset in complete good faith. Upon receipt of the subpoena in August 1976, Sea-Land instructed its counsel ("original counsel") to withhold from production all documents which were felt might be covered by the attorney-client privilege. On September 30, 1976, said counsel responded to the subpoena and turned over two groups of documents which Sea-Land's current counsel are now claiming were protected by the privilege.

One group need not detain us any further. For whatever reason, original counsel did not mark these papers as potentially privileged and voluntarily turned them over. This must be deemed a complete waiver. Original counsel's responsibility was to determine the privileged status of Sea-Land's documents. Its decisions in this regard were binding on its client. Privilege claims cannot be reopened by retaining new counsel who read the privilege rules more broadly than did their predecessor.

The second group of documents was marked by original counsel with a "P." When the Antitrust Division received them it thought something might be amiss and promptly asked original counsel whether the set had been disclosed by mistake. Counsel investigated and explicitly, even though mistakenly, advised that the documents were intended to be disclosed and that no privilege was accordingly claimed. It was not until March 1977 that original counsel discovered their mistake, so advised the Antitrust Division, and indicated that a formal demand for return would be forthcoming. No such demand was made, however, until early 1978 after new counsel had been retained by Sea-Land. Sea-Land itself was first advised of the inadvertent disclosure in December of 1977. Since September 1976, the documents have been copied, digested and analyzed by the Antitrust Division, as well as periodically used in connection with the grand jury investigation. Several witnesses have been asked questions concerning the documents, including Mr. Halloran, a high official of Sea-Land who was represented by personal counsel and testified with respect to the documents pursuant to a related order of the District Court.

Assuming that these documents were in fact privileged prior to their disclosure to the Government—an issue not before this Court—it is clear that the mantle of confidentiality which once protected the documents has been so irretrievably breached that an effective waiver of the privilege has been accomplished. Because of the privilege's adverse effect on the full disclosure of the truth, it must be narrowly construed. *Underwater Storage, Inc.* v. *United States Rubber Co.*, 314 F. Supp. 546, 547 (D.D.C. 1970). An intent to waive one's privilege is not necessary for such a waiver to occur. *Id.*, at 549; *Daniels* v. *Hadley Memorial Hospital*, 68 F.R.D. 583, 587 (D.D.C. 1975). "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not." 8 Wigmore, Evidence § 2327 (McNaughton rev. 1961). *See* McCormick, Evidence § 93 (Cleary ed. 1972). Moreover, "[a]ll involuntary disclosures, in particular, through the loss or theft of documents from

the attorney's possession, are not protected by the privilege, on the principle . . . that . . . the law . . . leaves to the client and attorney to take measures of caution sufficient to prevent being overheard by third persons. The risk of insufficient precautions is upon the client." 8 Wigmore, Evidence § 2325 (McNaughton rev. 1961). *See United States* v. *Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 464-65 (E.D. Mich. 1954). Perhaps this latter rule should not be strictly applied to all cases of unknown or inadvertent disclosure; this, however, is not a case where any such exception would be appropriate. Here, the disclosure cannot be viewed as having been inadvertent in all respects. Original counsel knew that some papers marked "P" had been divulged. This production was brought to their attention on at least one occasion; each time, however, said counsel declined to assert the privilege. Similarly, the Government cannot be said in any way to have "compelled" Sea-Land or original counsel to produce privileged documents; and there certainly was here an adequate opportunity in September 1976 to claim the privilege. *Cf.*, *Transamerica Computer Co.* v. *IBM*, 573 F.2d 646, 651-52 (9th Cir. 1978).

To be sure, in the final analysis, the privilege is for the client, not the attorney, to assert. McCormick, Evidence § 92 (Cleary ed. 1972). Original counsel, however, acted as Sea-Land's agent in determining which documents would be produced pursuant to the subpoena and which documents would be withheld under the attorney-client privilege. Original counsel acted within the scope of authority conferred upon it, and Sea-Land may not now be heard to complain about how that authority was exercised.

Most importantly, it would be unfair and unrealistic now to permit the privilege's assertion as to these documents which have been thoroughly examined and used by the Government for several years. *See Underwater*

Storage Co. v. *United Rubber Co.*, *supra*, 314 F. Supp. at 549; *United States* v. *Kelsey-Hayes Wheel Co.*, *supra*, 15 F.R.D. at 464-65. The Government attorneys' minds cannot be expunged, the grand jury is familiar with the documents, and various witnesses' testimony regarding the papers has been heard. This is not a case of mere inadvertence where the breach of confidentiality can be easily remedied. Here, the disclosure cannot be cured simply by a return of the documents. The privilege has been permanently destroyed.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1539 September Term, 1978

Filed May 1, 1979

In Re:

GRAND JURY INVESTIGATION OF OCEAN TRANSPORTATION, APPELLANT

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, and Wilkey, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by appellant Sea-Land Services, Inc., having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge Robb did not participate in the foregoing order.

No. 79-131

In the Supreme Court of the United States

OCTOBER TERM, 1978

SEA-LAND SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

JOHN J. POWERS, III
MARION L. JETTON
Attorneys
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-131

SEA-LAND SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1979. A petition for rehearing was denied on May 1, 1979 (Pet. App. 8a). The petition for a writ of certiorari was filed on July 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner waived the attorney-client privilege with respect to documents which its counsel knowingly

and purposely delivered to the government on behalf of petitioner without invoking the privilege and which were subsequently used in a grand jury investigation.

STATEMENT

1. In August 1976, a grand jury investigating ocean transportation of freight issued a subpoena duces tecum directing petitioner to produce certain categories of documents relevant to the investigation. The subpoena stated that if petitioner declined to produce any documents on the ground that they were privileged, petitioner should present a list of such documents (J.A. 28-38, 113).[1]

On September 30, 1976, petitioner's original counsel delivered six boxes of documents to the government attorney in charge of the investigation. The documents were accompanied by a transmittal letter signed by a senior partner of the law firm; petitioner did not submit a list of documents withheld on the basis of privilege. After government counsel advised petitioner's counsel that some of the documents produced were marked "P" and that some of the documents appeared to be photocopies rather than originals, petitioner's attorney, accompanied by the prosecuting attorney, individually examined each document marked "P." Following this examination, petitioner's attorney assured the government attorney that he had conferred with the senior partner and that the government was intended to have these documents. In fact, petitioner's counsel exchanged the originals of some of these documents for the photocopies originally delivered to the government. Subsequently, the senior partner who signed the transmittal letter also assured the government that petitioner had intended to deliver those

[1]"J.A." refers to the Joint Appendix filed in the court of appeals.

particular documents to the United States, and that the marked documents had been initially screened as privileged but were not actually exempt from disclosure. On the basis of these representations, the grand jury was permitted to consider all relevant documents that had been produced, including some marked "P" (Pet. App. 4a-5a; J.A. 42, 114-120).

On March 9, 1977, petitioner's counsel telephoned government counsel and advised that several documents had been disclosed inadvertently. After a meeting, petitioner's counsel stated that they would make a formal written request for return of the documents. However, petitioner's original counsel never made a written request for the return of the documents (J.A. 121-122, 132-133).

The next communication concerning the documents occurred in late December 1977, when new counsel for petitioner, retained to represent it in the grand jury investigation, spoke with the government attorneys. A government attorney informed these counsel that documents marked "P" had been produced.[2] During January and February 1978, almost a year and a half after the documents had been produced, the new counsel made a formal request for return of the documents marked "P." In June 1978, the new counsel also formally requested the return of 10 additional documents that had not been marked "P" and concerning which no claim of privilege had previously been made. The government denied both requests and continued to use all of the documents that had been turned over to the grand jury, including those marked "P" (J.A. 51, 55, 72-76, 122-123).

[2]Petitioner's original counsel had informed petitioner of the production of the documents on December 2, 1977, but petitioner did not advise its new counsel of the problem (J.A. 133-134).

2. On June 7, 1978, Richard Halloran, petitioner's employee, refused to testify before the grand jury when questioned about matters contained in the disputed documents. The United States filed a motion to compel his testimony. Petitioner opposed this motion and also filed the motion at issue here, requesting return of 11 of the documents marked "P" and the ten additional documents (J.A. 2-3). After a hearing, the district court ordered Halloran to testify, holding that petitioner had waived any attorney-client privilege as to the documents in question (J.A. 21-22).

On appeal, the court of appeals affirmed (Pet. App. 1a-7a). It concluded that the original counsel's decisions regarding the various documents were binding on petitioner. The court observed that counsel had acted within the scope of their authority and that the confidentiality that may have once protected the documents "has been so irretrievably breached [by their use in the grand jury] that an effective waiver of the privilege has been accomplished" (Pet. App. 4a-6a). The court distinguished cases relied on by petitioner, noting that petitioner had adequate opportunity to claim the privilege, that the documents had been used by the government in good faith for several years, and that, in sum, this was not "a case of mere inadvertence where the breach of confidentiality can be easily remedied" (Pet. App. 6a-7a).

After the court below rendered its decision, the grand jury returned a one-count indictment charging petitioner and others with violating Section 1 of the Sherman Act, 15 U.S.C. 1. Petitioner entered a plea of nolo contendere to the indictment and has been sentenced. At the completion of the litigation, the government returned the originals of the documents at issue but retained copies (Pet. 5-6).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is unwarranted.[3]

Petitioner contends (Pet. 6-9) that it did not waive its attorney-client privilege regarding various documents. Petitioner, however, voluntarily authorized its counsel to produce on behalf of the corporation those documents which were not protected by the attorney-client privilege. Petitioner thus implicitly directed its counsel to act as its agent in responding to the government's request for documents. See VIII *Wigmore on Evidence*, § 2325 (McNaughton rev. 1961). Thereafter, original counsel, acting within the scope of this agency and in good faith, delivered six cartons of papers to the government. And, contrary to petitioner's suggestion, the documents were not turned over inadvertently. See Pet. App. 6a. Rather, counsel had repeated opportunities to inspect the documents and, in fact, specifically reconsidered the several documents marked "P" at the government's request. Accordingly, petitioner cannot now be heard to complain simply because years later different counsel would have evaluated the privileged nature of certain documents differently.[4] See *McCormick's Law of Evidence* § 93, at 194 (2d ed. 1972).

[3]At the outset, we note that in light of the production of documents and the plea of nolo contendere, there are substantial questions concerning the justiciability and appealability of the district court's order rejecting petitioner's claim of privilege. See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530 (1971); *Cobbledick* v. *United States*, 309 U.S. 323, 328 (1940).

[4]Because both lower courts found that any attorney-client privilege had been waived, neither had occasion to decide whether the documents in question were privileged in the first instance.

Moreover, both courts below concluded that the government's good faith use and control of the documents for several years effectively waived the privilege (Pet. App. 5a-7a; J.A. 18). The attorney-client privilege pertains only to documents that have been kept confidential. See, *e.g.*, *United States* v. *Gordon-Nikkar*, 518 F. 2d 972, 975 (5th Cir. 1975); Proposed Federal Rule of Evidence 503(a)(4), (b), 56 F.R.D. 235 (1972); 2 *Weinstein's Evidence* para. 503(a)(4)[01] (1979). To be sure, an attorney's inadvertent disclosure of an otherwise confidential document for a short period of time might not waive the privilege. But where, as here, the document has been purposefully disclosed to persons outside the attorney-client relationship for a substantial period of time, the purpose of the privilege has been destroyed and the privilege will be deemed to have been waived. See, *e.g.*, *Underwater Storage, Inc.* v. *United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970); *United States* v. *Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 464-465 (E.D. Mich. 1954).

Nor is there any merit to petitioner's contention (Pet. 6-7) that the decision below conflicts with decisions of other courts of appeals. In both *Transamerica Computer Co.* v. *International Business Machines Corp.*, 573 F. 2d 646 (9th Cir. 1978), and *International Business Machine Corp.* v. *United States*, 471 F. 2d 507 (2d Cir. 1972), vacated and dismissed, 480 F. 2d 293 (en banc) (1973), cert. denied, 416 U.S. 979 (1974), the courts of appeals concluded that a particular accelerated discovery program had compelled production of the documents and had thereby precluded an adequate opportunity for raising the claim of privilege. Here, in contrast, "the Government cannot be said in any way to have 'compelled' [petitioner] or original counsel to produce privileged documents; and there certainly was here an adequate opportunity in September 1976 to claim the privilege" (Pet. App. 6a).

Moreover, the panel opinion in *International Business Machines Corp.* v. *United States*, *supra*, relied on by petitioner was, in any event, vacated by the en banc court. See 480 F. 2d 293.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

Wade H. McCree, Jr.
Solicitor General

John H. Shenefield
Assistant Attorney General

John J. Powers, III
Marion L. Jetton
Attorneys

September 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-131

SEA-LAND SERVICE, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONER'S REPLY MEMORANDUM

JOHN C. FRICANO
JOHN M. NANNES
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-131

SEA-LAND SERVICE, INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONER'S REPLY MEMORANDUM

---

1. For the first time in this litigation, the Government contends that original counsel produced privileged documents "knowingly and purposely." (Br. in Opp. at 1-2) This characterization of original counsel's actions is grossly misleading and unsupported by the record.

The relevant facts are established by the uncontroverted affidavit of original counsel. (JA 39-44) Original counsel believed that the "P" documents were privileged and intended to withhold them from production (JA 40), but they were inadvertently delivered to the Government. (JA 42) When the government attorney inquired whether

production of those documents had been intended, original counsel—believing the inquiry to be directed to different documents—mistakenly informed the Government that production had been intentional. (JA 43)

The Government's characterization of the production as "knowing and purposeful" is apparently based on the fact that the possibility of a mistaken delivery was called to the attention of original counsel and original counsel assured the Government that the production had been proper.[1] This fact fails to support the Government's characterization, however, since the record establishes that original counsel mistakenly believed that the Government was inquiring about other documents.

Original counsel believed that the "P" documents were privileged. The Government does not and cannot dispute the fact that original counsel intended to withhold the "P" documents from production, and the Court of Appeals specifically found that original counsel mistakenly assured the Government that production of the documents had been deliberate. (Pet. App. 4a-5a) Furthermore, upon discovering its error, original counsel notified the Government that the production had been inadvertent and mistaken. (JA 43, 121, 132) In these circumstances, it is disingenuous for the Government to argue that the controversy arises "simply because years later different counsel . . . have evaluated the privileged nature of certain documents differently." (Br. in Opp. at 5)

2. Sea-Land contends that the attorney-client privilege belongs to the client and not to the attorney. Accordingly,

[1] It is possible that the Government used the terms "knowingly and purposely" to mean that original counsel produced privileged documents, knowing them to be privileged. Sea-Land made no such suggestion in the courts below, and even the Government's authorities do not support the proposition that the privilege would be waived in such circumstances. VIII WIGMORE ON EVIDENCE §2326, at 633 n.2 (McNaughton rev. 1961). If the opinion of the Court of Appeals is susceptible to such an interpretation, then review is necessary to reject such an unwarranted construction.

the unauthorized actions of original counsel cannot constitute a waiver of the attorney-client privilege. The Government implicitly accepts Sea-Land's position when it admits that "an attorney's inadvertent disclosure of an otherwise confidential document for a short period of time might not waive the privilege." (Br. in Opp. at 6) Implicit in this concession is recognition that unauthorized disclosure by an attorney cannot waive the client's privilege. But, contrary to the Government's position, the length of time during which such documents are inadvertently disclosed is relevant only if the client is properly chargeable with a failure to exercise due diligence in asserting the privilege. Here, however, it is undisputed that original counsel deliberately kept the fact of the mistaken production from Sea-Land until December 1977, at which time the Company moved through present counsel to assert the privilege and take all possible steps to obtain return of the documents.

3. Although the criminal proceedings between Sea-Land and the Government have been completed, the Government has refused to return copies of the documents and has threatened to use them in administrative proceedings. Additionally, plaintiffs in private antitrust actions against Sea-Land are attempting to compel production of the "P" documents on the basis of the opinion below.[2] The opinion of the Court of Appeals is inconsistent with decisions in other Circuits, and review is

[2] The Government tentatively suggests that the present controversy may be moot "in light of the production of documents and the plea of nolo contendere." (Br. in Opp. at 5, n.3) Of course, if the controversy is moot, the proper disposition would be for this Court to summarily vacate the judgment and opinion of the Court of Appeals and remand the matter to the District Court with instructions to dismiss. *Great Western Sugar Co.* v. *Nelson*, 47 U.S.L.W. 3774 (May 29, 1979); *United States* v. *Munsingwear*, 340 U.S. 36, 39-40 (1950). Indeed, the *Munsingwear* rule is designed to prevent unfair collateral estoppel effects that might otherwise result from the judgment below.

necessary to vindicate the proposition that the attorney-client privilege belongs to the client and not to the attorney.[3]

Respectfully submitted,

JOHN C. FRICANO
JOHN M. NANNES
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
Suite 900
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 293-9233

Counsel for Petitioner
Sea-Land Service, Inc.

Dated: September 1979
Washington, D.C.

---

[3] The Government contends that contrary decisions in other Circuits rest upon the conclusion that the inadvertent disclosures resulted from accelerated discovery programs and thus are distinguishable from the present controversy. In point of fact, the record in this case demonstrates the difficulties encountered by original counsel in attempting to meet production deadlines imposed by the Government (JA 80-112), and in any event the District Court made no findings on this point whatsoever inasmuch as it believed that the physical act of production was sufficient to establish waiver. Additionally, it should be noted that the panel opinion in *International Business Machines Corp.* v. *United States*, 471 F.2d 507 (2d Cir. 1972), was vacated on grounds unrelated to the Panel's decision on the issue of waiver.